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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

**SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE and
SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,**
Petitioners,

v.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,**
Respondent.

**(DENNIS JONES, JOHN AND ROSA GEORGE,
REAL PARTIES IN INTEREST)**

**On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit**

**BRIEF OF THE GOVERNMENT OF THE
UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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BRIEF OF THE GOVERNMENT OF THE
 UNITED KINGDOM OF GREAT BRITAIN
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 AS AMICUS CURIAE IN SUPPORT OF PETITIONERS *

* Both Petitioners and Respondent have consented to the appearance of the Government of the United Kingdom of Great Britain and Northern Ireland as an amicus curiae, and the written consents are on file with the Clerk. The decision below is reported at 782 F.2d 120 (8th Cir. 1986).

THE INTEREST OF AMICUS CURIAE

A. Statement of Issues

The amicus submits this brief in support of petitioners because the decision below threatens important interests shared by the United Kingdom and the United States in resolving, on the basis of mutual deference and respect, international judicial conflicts. It would be unfortunate if consideration in this case were given only to the narrow question of whether the United States, in ratifying the Hague Evidence Convention,¹ bound itself to use only the Convention to obtain information located abroad from a party over whom the court has personal jurisdiction. The two questions raised by petitioners in this appeal require consideration of the more significant included issue of:

Whether a United States court may require a party to produce information located abroad, in violation of a foreign "blocking law,"² without taking reason-

¹ Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and France on October 6, 1974).

² The term "blocking law" is used increasingly to refer to defensive laws adopted by a majority of the member states of the Organization for Economic Cooperation and Development. Their general purpose is to limit the extraterritorial application of the laws of foreign states seeking to regulate persons or conduct within another state in a manner or with consequences that are viewed as undermining the sovereignty of that other state. This case involves the French defensive law (French Penal Code Law No. 80-538, 1980 J.O., 1799, 1980 D.S.L. 285). The relevant portion of the law states:

Article 1—bis—Subject to treaties or international agreements and laws and regulations in force, it is forbidden to all persons to ask, research or communicate, by writing, orally or under any other form, documents or information on economical, commercial, industrial, financial or technical matters leading to

able steps, consistent with the principle of comity, to avoid or limit the (1) undermining of either nation's important interests or (2) imposing of conflicting legal requirements on individuals.

We submit that, as a matter of United States law, informed by the practice of other nations such as the United Kingdom, it may not.

B. The Interests of the Government of the United Kingdom

The Government of the United Kingdom believes it may be of assistance to this Court because this case presents issues which United Kingdom courts also consider from time to time. United Kingdom experience in dealing with them may be relevant because of our shared common law heritage, and because of our general agreement on the purposes and procedures of litigation. The United Kingdom also is a party to the Hague Evidence Convention, and it has an interest in ensuring that the Convention functions satisfactorily. Its general approach to the Convention appears to be closer to that of the United States than to that of other signatory nations, such as France, which follow the civil law tradition.

It is submitted that the view of the United Kingdom is consistent with U.S. law, and that this case may be properly decided without establishing that foreign parties before American courts necessarily owe a higher loyalty to American law than to the law of their home sovereign with respect to conduct in their home territory. If such a principle were sanctioned in this case,³ it not only would

establishing proofs for use directly or indirectly in foreign judicial or administrative proceedings.

The French government has stated that it considers use of the Hague Evidence Convention (which is such an "international agreement . . . in force") to seek documents reasonably specific and directly relevant to the litigation generally unobjectionable under the law.

³ A recent case raising many of the same considerations as the case below which has been a source of particular concern to the

undermine U.K. authority over the activity of persons in the United Kingdom but may, in the converse situation, undermine the authority of the United States government to regulate the conduct of persons in the United States. The Atlantic partnership between our two nations and the international community would be ill-served thereby.

C. Statement of Facts

An aircraft manufactured by petitioners (defendants below) was involved in an accident in Iowa. Three persons sued petitioners in Federal court alleging tort liability, and they accepted the court's jurisdiction. Plaintiffs sought discovery under the Federal Rules of Civil Procedure. Petitioners, which are French corporations, sought a protective order requiring that plaintiffs' requests for information be channelled pursuant to the requirements of the Hague Evidence Convention, claiming that the relevant information was located in France, and that to furnish it by any other means would violate a French criminal statute. A magistrate acting on behalf of the district judge denied the request for a protective order and his denial was upheld by the court of appeals below on a petition for a writ of mandamus. The magistrate's action has been stayed pending decision by this Court.

ARGUMENT

I. IN THE VIEW OF THE UNITED KINGDOM, THE HAGUE EVIDENCE CONVENTION IS NOT IN ITSELF THE EXCLUSIVE MEANS OF GATHERING INFORMATION FROM A FOREIGN NATION; BUT THAT IS NOT DISPOSITIVE OF THIS CASE.

The Government of the United Kingdom agrees with the court below that the Hague Evidence Convention does not provide the exclusive and mandatory means for ob-

United Kingdom Government is *In re Grand Jury Proceedings The Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), cert. den., — U.S. —, 105 S.Ct. 788 (1985).

taining documents and information located in another signatory state.⁴ That, however, is not the issue. It does not aid analysis to inquire whether the Convention is "mandatory" or "optional." It may be one or the other, depending on the manner of domestic implementation by the two signatory states involved.

The Convention deals with two quite distinct aspects of international judicial assistance and cooperation: the obligation of a signatory state in its capacity as a "receiving state" or "state of execution," with respect to foreign requests for information located in its territory, and its obligations when it acts as a "sending state" or "state of origin" and seeks information which is located in the territory of another signatory state.

When the United Kingdom acts as a "receiving state," its implementing legislation—the Evidence (Proceedings in Other Jurisdictions) Act 1975, c. 34—provides for the transmission of foreign evidentiary requests through the machinery established under the Convention ("the "Central Authority" which each signatory state must establish under Article 2 of the Convention). But United Kingdom law and practice does not make that transmission route exclusive by designating the Convention machinery as the only means for foreign litigants or foreign authorities to gather information in the United Kingdom. Nor, in fact,

⁴ Article 1 of the Convention expressly provides in pertinent part that—

In civil or commercial matters a judicial authority of a Contracting State *may*, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act. [Emphasis added.]

In addition, Article 27 of the Convention explicitly recognizes that the domestic law of a signatory state may permit the transmission of letters of request or the gathering of information or taking of evidence in its territory upon less restrictive conditions, or by methods other than those provided for in the Convention.

does it even make the Convention a preferred mechanism. Rather, foreign litigants may, by means of a letter of request, apply directly to the appropriate courts in the United Kingdom for judicial assistance. Further, foreign courts, or litigants before such courts, may seek information without the interposition of United Kingdom courts if, as in this case, the court of origin exercises jurisdiction consistent with accepted norms of international law.⁵ The United Kingdom does not consider evidence-gathering activities by foreign litigants on U.K. soil necessarily to be an infringement of its judicial sovereignty in all cases. United Kingdom law and practice is thus similar to that of the United States, *see* 28 U.S.C. § 1782.

This does not determine, however, the appropriate course when the United Kingdom—or in this case the United States—acts as a sending state.

II. IN SOVEREIGN JURISDICTIONAL CONFLICTS OVER THE FURNISHING OF INFORMATION, COURTS SHOULD FULLY ADDRESS CONSIDERATIONS OF COMITY BEFORE ALLOWING DISCOVERY TO PROCEED BY MEANS NOT RECOGNIZED BY THE FOREIGN SOVEREIGN.

A. Courts Should Give Due Regard To A Signatory State's Requirement That The Convention Be The Mandatory Method For Obtaining Information From Within Its Territory For A Foreign Adjudication.

The Government of the United Kingdom is mindful that, in the civil law tradition, the obtaining of information for an adjudication is deemed an "official" act reserved to the local authorities, and that the taking of

⁵ If the United Kingdom objects to the foreign assertion of jurisdiction, it may, of course, invoke the P.T.I.A., *see* p. 13 *infra*, but that is an exceptional case. Consistent with Article 12(b) of the Convention, the Convention would not be available in such a case as an alternative means of discovery.

evidence or gathering of information in the territory of civil law jurisdictions in aid of foreign proceedings by private attorneys, albeit officers of their courts, is deemed an infringement of the exclusive judicial sovereignty of such states. There was, of course, full recognition of the diverse traditions and policies prevailing in common law and civil law jurisdictions when the delegations from 20 civil and 4 common law jurisdictions met at the Hague in 1968 to attempt to bridge the gap between these different traditions. The basic principle which animated the negotiation of the Convention was the common belief that a system was needed for obtaining evidence abroad which was "tolerable" in the state of execution and produced evidence in a form "utilizable" in the state of origin.⁶

In ratifying the Convention, the United Kingdom—like the United States—did not change its domestic law and practice as a "sending state" so as to make the convention machinery exclusive for securing evidence from abroad. It would have made no sense to burden U.K. litigants by interposing novel barriers to the gathering of information from other common law jurisdictions whose laws and practices permit the gathering of information upon less restrictive conditions than those provided for in the Convention.⁷ But, mindful of the civil law tradition of judicial sovereignty, the Government of the United Kingdom did not thereby suggest that in the event foreign-source information could not be obtained "common law style" from within a given signatory state, U.K. courts were to overlook the legal traditions of such a state and

⁶ Conference de La Haye de Droit International Prive, IV *Actes et Documents de la Onzieme Session: Obtention des Preuves a l'Etranger* 202 (Bureau Permanent de la Conference ed. 1970).

⁷ In the recent case of *South Carolina Ins. Co. v. Assurantie Maatschappij "De Zeven Provinciën" N.V.*, speeches delivered 29 July 1986 [not yet reported], the House of Lords struck down limitations imposed by U.K. lower courts on parties in English proceedings who make application to U.S. courts, under 28 U.S.C. § 1782, for production of evidence to be used in the English proceedings.

simply order, on pain of sanctions, the production of the foreign-source information on United Kingdom soil.

It is the view of the Government of the United Kingdom that where a state signatory to the Convention has signified by domestic law or practice—as the French Republic has done—that information located in that state should be obtained by foreign litigants exclusively under the Hague Evidence Convention or some other international agreement,⁸ due regard for foreign sovereign interests counsels that the Convention machinery should be employed in the first instance. If such an endeavor does not succeed, U.K. courts are not barred, after balancing the relevant interests of the state of origin and the state of execution, from ordering the production of relevant information in the United Kingdom, drawing unfavorable inferences from the failure to produce such evidence, or in an extreme case, imposing sanctions.

B. Comity Is A Basic Practice Recognized By The United States And Exercised By The United Kingdom.

In addition to the respect for differing traditions implicit in the Hague Convention, mutual self-restraint is embodied in the judicial practice of the United States⁹

⁸ No other international agreement is relevant here.

⁹ The Solicitor General and Legal Adviser of the State Department agree. See Solicitor General's Brief for the United States as Amicus Curiae at 11, *Anchuetz & Co., GmbH v. Mississippi River Bridge Authority et al.* (1985) (No. 85-98). Not all United States courts have done so. One court has suggested that this Court granted a motion to compel discovery in *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers* ("Societe"), 357 U.S. 197, 204-06, with no "hint that the disclosure policies of the American statute should be balanced against the secrecy policies of Swiss law." *In re Uranium Antitrust Litigation*, 480 F. Supp. 1139, 1146 (N.D. Ill. 1979). However, the issue of whether a comity analysis is required was not decided by this Court in *Societe* because it was not considered. Review of the briefs submitted by the parties in *Societe* shows that Petitioner did

and the United Kingdom.¹⁰

The United States, together with the United Kingdom and France, has participated in an explicit declaration of the need to observe comity, issued by the Organization for Economic Cooperation and Development ("OECD"), through a series of recommendations endorsed by the OECD Council, meeting at the Ministerial level, on May 18, 1984.¹¹ This Court, too, has repeatedly acknowledged

not raise the issue of whether the courts below impermissibly failed to undertake a comity analysis in that case. The issue was raised indirectly by the Respondent (at 67) when it asserted, in passing, that the Swiss Government "cannot by its laws, better the position of its national, over itself and all other claimants when to do so would seriously prejudice the administration of justice to the opposing party" (citing 348 U.S. 356). In its Reply Brief (at 20), the Petitioner denied that it was raising any such contention and the issue was not joined or briefed.

¹⁰ Other nations likewise have shown sensitivity to considerations of comity. For example, in *Frischke v. Royal Bank*, 17 Ont.2d 388 (1977), the Ontario Court of Appeal determined that court ordered disclosure of information from bank officers in Panama would constitute a breach of Panamanian law. In language recognizing the clear primacy of the territorial state's interest, the court declined to require production, notwithstanding some significant Canadian interests that would have been furthered by doing so.

¹¹ Organization for Economic Cooperation and Development, PRESS/A (84)28, ¶ 36 (May 18, 1984). In relevant part, these recommendations state:

27. In contemplating . . . exercise of jurisdiction which may conflict with the legal requirements or established policies of another Member country and lead to conflicting requirements being imposed on multinational enterprises, the Member countries concerned should:

i) . . .

ii) Endeavour to avoid or minimise such conflicts and the problems to which they give rise by following an approach of moderation and restraint, respecting and accommodating the interests of other Member countries. . . .

Organization for Economic Cooperation and Development, International Investment and Multinational Enterprises: The 1984 Review of the 1976 Declaration and Decisions 26 (1984).

the need to give "due recognition of our self-regarding respect for the relevant interests of foreign nations." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959); cf. *Lauritzen v. Larsen*, 345 U.S. 571, 581-82 (1953).

Lower United States courts have likewise recognized this principle. Not only have the courts of almost all circuits adopted some form of comity balancing test advanced in cases such as *Timberlane Lumber Co. v. Bank of America*,¹² but in a situation most closely analogous to this one within the federal system, lower courts have been unwilling to sustain contempt findings against state officials who have refused to furnish information to federal grand juries on the basis of state laws.¹³

¹² 549 F.2d 597, 613 (9th Cir. 1976); see *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 722 F.2d 657, 658 (11th Cir. 1983); *United States v. First National Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983); *Montreal Trading Ltd. v. Amaz, Inc.*, 661 F.2d 864, 869 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1302 (3d Cir. 1979) (concurring opinion); *In re Grand Jury Proceedings, United States v. Field*, 532 F.2d 404, 407 (5th Cir. 1976), cert. denied, 429 U.S. 940 (1976); *National Bank of Canada v. Interbank Card Association*, 507 F. Supp. 1113, 1119-20 (S.D.N.Y. 1980), aff'd on other grounds, 666 F.2d 6 (2d Cir. 1981). In *Laker Airways Limited v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984), although Judge Wilkey declined to apply the *Timberlane* comity analysis to the particular fact situation, he noted that such an analysis might be more appropriate if the appellants were nationals of the foreign state whose interests would be balanced against American interests. *Id.* at 954 n.175. Further, in the earlier decision of *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1326 n.148 (D.C. Cir. 1980), Judge Wilkey expressly accepted the need to engage in balancing in the case of the very law here in issue. Cf. *Natural Resources Defense Council Inc. v. Nuclear Regulatory Commission*, 647 F.2d 1345, 1365 n.107 (D.C. Cir. 1981) (citing *Timberlane* to justify permitting Philippine sovereign interest to prevail over Nuclear Regulatory Commission administrative interest).

¹³ See, e.g., *In re Hampers*, 651 F.2d 19, 23 (1st Cir. 1981) ("comity and deference arising from federalism" support the grant-

The practice of U.K. courts also has been to exercise restraint in cases which might engender jurisdictional conflicts. In *R v. Grossman*,¹⁴ the Court of Appeal discharged an order of the lower court directed to the Barclays Bank in London which would have permitted the commissioners of Inland Revenue to inspect, and copy entries in, the books held in London by a Manx branch of the Barclays Bank.¹⁵ The judicial authority in the Isle of Man had issued an injunction against the Isle of Man branch, restraining it from disclosing the information in question. Under those circumstances, Lord Denning declared:

Any order in respect of the production of the books ought to be made by the courts of the Isle of Man—if they will make such an order. It ought not to be made by these courts. Otherwise there would be danger of a conflict of jurisdictions between the High Court here and the courts of the Isle of Man. That is a conflict which we must always avoid.

73 Crim. App. at 308.

Similarly, in *MacKinnon v. Donaldson Lufkin Corp.*, [1986] 2 W.L.R. 453, [1986] 1 All E.R. 653 (Ch.D.), Justice Hoffman of the High Court discharged a subpoena and order directing the Citibank branch in London to produce in London documents from its New York head office for use in an action involving alleged international fraud. Although no direct, conflicting sovereign command to the bank was shown, the court noted that "in a case like this, when alternative legitimate procedures are avail-

ing of a "qualified privilege" to state officials who act in accordance with a state nondisclosure law); *In re Cruz*, 561 F. Supp. 1042 (D. Conn. 1983) (same); *In re Grand Jury Empanelled Jan. 21, 1981*, 535 F. Supp. 537 (D.N.J. 1982) (same).

¹⁴ 73 Crim. App. 302 (C.A. 1981).

¹⁵ The Isle of Man has a separate legal system and is deemed a foreign jurisdiction by the courts of the United Kingdom.

able, an infringement of sovereignty can seldom be justified." [1986] 1 All E.R. at 662. Accordingly, it is to be expected that when presented with a situation similar to the one in this case, a United Kingdom court would not compel discovery but would favor the alternative procedure provided by the Hague Convention in order not to infringe upon the sovereignty of another state.

Further, in *Lonrho Ltd. v. Shell Petroleum* [1980] 1 W.L.R. 627 (H.L.), when South African and Rhodesian subsidiaries of an English company declined to disclose documents on the grounds that disclosure would constitute a criminal offense abroad, Lord Diplock held that this circumstance made it "quite unarguable" that the documents were ever in the "power" of the parent companies for the purposes of R.S.C. Order 24. The expression "power" was defined by Lord Diplock as "a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else." A clear inference to be drawn from this is that the existence of a local law prohibiting disclosure prevents the documents from being in a party's power for the purposes of R.S.C. Order 24.

C. Several Principles Should Guide a Court In Exercising Comity.

1. A Court Should Not Lightly Disregard Foreign States' Enactments of Defensive Laws.

The Republic of France, at least 13 other nations¹⁶ and the United Kingdom have all enacted defensive legislation with respect to foreign exercises of jurisdiction

¹⁶ See Restatement (Revised) § 437, Reporters' Note 1 (Tent. Draft No. 7, April 10, 1986). To the best of our knowledge, these nations have not, in peacetime, ever repudiated the territorial preference for resolving jurisdictional disputes, even in situations where this means foregoing their own claim to jurisdiction.

within their territories. Section two of the U.K. Protection of Trading Interests Act 1980, c. 11 ("P.T.I.A.") deals specifically with documents and information required by overseas courts and authorities. That section provides, *inter alia*, that the Secretary of State may by order prohibit compliance with requests for documents or information to be used in foreign legal proceedings when furnishing such information "infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to" its sovereignty, security, or relations with the government of any other country. It differs from the corresponding French law insofar as it is not self-executing and applies to very few situations in which foreign courts attempt to assert jurisdiction over persons and conduct in the United Kingdom. Since its adoption in 1980, this section of the Act has been invoked in relation to only two different matters. The Secretary of State issues a direction only after determining that vital U.K. interests in maintaining its territorial sovereignty are seriously threatened by an exercise of foreign jurisdiction, and after carefully weighing the potential effect on relations with the country concerned.

The P.T.I.A. is a self-protective measure designed to assure that this sovereign policy of the United Kingdom is respected. Consistent with the American act of state doctrine, the P.T.I.A. should not be subject to review, discount or attack by a U.S. court.

[T]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.¹⁷

¹⁷ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). This Court further opined in a case involving a conflict between federal law and the law of a state of the United States, that any supervised regulation of conduct within a state's territory which is predicated

United Kingdom courts are similarly disinclined to examine a foreign government's motives for promulgating laws. In *Settebello Ltd. v. Banco Totta & Acores*, [1985] 2 All E.R. 1025, Megaw, L.J., of the Court of Appeal stated:

The English court will not exercise its discretion to invite the judicial authorities of a friendly foreign state to use its powers to assist in the obtaining of evidence from a witness residing in that state, or in another friendly foreign state, directed toward seeking to establish what were the motives of [the foreign state's law promulgating body] in deciding on and publishing that law.¹⁸

The United Kingdom is entitled to exercise its sovereign power within its jurisdiction, and it is entitled to protect that exercise by the sovereign act of promulgating defensive legislation. The Republic of France, too, in enacting its defensive law, has engaged in an exercise of sovereign power. United States courts should not lightly reject such expressions of sovereign authority. A consistent application of the act of state doctrine will enhance mutual cooperation and will also render invocation of the P.T.I.A. much less necessary.

2. In Defining the Respective National Interests at Stake, Courts Should Consider Whether Those Interests are Truly in Conflict.

The United States has several substantial interests in this litigation. As the court below noted, there is an interest in "protecting United States citizens from harmful products and compensating them for injuries arising from

upon clear state policy should not be subject to attack. *Southern Motors Carriers Rate Conference, Inc. v. United States*, — U.S. —, 105 S.Ct. 1721 (1985).

¹⁸ *Id.* at 1031.

use of such products."¹⁹ French law does not challenge that interest, so long as adequate evidence may be obtained through the Hague Convention.²⁰ The United States also holds an interest in having adjudication go forward with the best evidence available. The French law does not challenge that interest. There is the further interest, frequently forgotten, in promoting respect for the sovereign equality of states under international law; American individuals and enterprises benefit when another nation's authorities manifest respect for United States sovereignty. It is in the interest of all concerned parties to foster a relatively stable and predictable international system in which it is possible at the same time to abide by the law of each friendly trading nation where one does business. The multinational corporation cannot prosper if it continually risks substantial economic sanction in developed countries.²¹

¹⁹ Pet. App. 23a.

²⁰ Determining whether U.S. interests are challenged necessarily requires consideration of available alternatives. As a U.S. court determined in holding that a state official had a qualified privilege to refuse to furnish information to a federal grand jury on the basis of a state nondisclosure law, a court must "seek a more particularistic answer than the macrocosmic one that effective federal criminal law enforcement is more important than state tax collection." *In re Hampers*, 651 F.2d 19, 23 (1st Cir. 1981). Similarly, another U.S. court, in resolving a conflict between a potential construction of the scope of FTC subpoena power and the very French law at issue here, acknowledged that the construction "less likely to conflict directly with regulations of other nations should be chosen." *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1327 n.150 (D.C. Cir. 1980).

²¹ See *Interamerican Refining Corporation v. Tezaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D.C. Del. 1970), in which the court stated in respect to application of American antitrust laws to anti-competitive practices compelled by foreign nations: "Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business. The Sherman Act does not go so far."

Simply weighing these United States interests *inter se* leads to the conclusion that the Hague Convention should be used here. U.S. interests may be adversely affected only by the occasion of some delay. Delay is often a regrettable aspect of litigation and reducing it is much to be desired. However, if the other substantial United States interests are served thereby, a finite delay is a small price worth paying.

3. *That the Information Sought Would Ultimately Be Produced in the United States Does Not Vitate the Territorial Interest of France.*

It must be recognized that France has a vital interest in having its defensive law respected as to information and conduct within its territory, even though the information can be produced within the United States. The United States itself recognizes a corresponding, vital United States interest in protecting against the dissemination of some information across its borders. For example, the United States restricts the flow of important technical data through the Export Administration Regulations, 15 C.F.R. Part 379, promulgated under the authority of the Export Administration Act, 50 U.S.C. app. § 2401 *et seq.* Similarly, Congress has responded to certain political boycotts by prohibiting United States persons from furnishing to boycotting countries information concerning the race, religion, sex, or national origin of any other United States person. 50 U.S.C. app. § 2407 (1982).²² Surely no court of the United States would rule that the United States government has no interest in the disclosure of

²² While the United Kingdom has expressed the most serious concern about the proper scope of U.S. jurisdiction to impose re-export controls and anti-boycott restrictions once goods and information have left U.S. territory, the sovereignty of the United States to impose those controls *within* the United States (including transmission of information across its borders) should not be challenged. That jurisdiction "is necessarily exclusive and absolute." *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C. J.).

such information merely because the disclosure takes place in another country.

The respondents here are seeking documents, interrogatory responses and admissions. Compliance by petitioners will require an extensive descriptive search of files in French offices. Company executives will have to be interviewed and will be required to review with counsel the significance of the documents and the appropriate responses and admissions. That is conduct in France. Even if the French corporate executives were to leave their offices and undertake this review outside France—*e.g.*, in the United States—a United States court will demonstrably have affected conduct in France by causing the departure of persons and removal of documents and information from France. The interest of a foreign sovereign in what its residents are directed to do within its territory is strong and indisputable even when the forum state attempts to enforce its orders solely by sanctions within the forum state and not by actually sending in its police. *Cf. Shaffer v. Heitner*, 433 U.S. 186 (1977) (the power to enforce a judgment by exercising control over property within the forum state is not sufficient to confer jurisdiction where a state has no substantial contacts).

4. *A Foreign State's Willingness To Assist U.S. Courts Generally Should Be Taken Into Account.*

U.S. judges may also give weight to the extent to which the courts and authorities of the foreign state routinely cooperate with courts of the requesting state. The courts of the United Kingdom recognize their general responsibility to assist the courts of the United States in adjudicating lawsuits involving U.K. subjects and nationals of other states. As Lord Denning observed,

it is our duty and our pleasure to do all we can to assist [a United States] court, just as we would expect the United States court to help us in like circumstances. 'Do unto others as you would be done

by.' *Re Westinghouse Electric Corporation Uranium Contract Litigation*, [1977] 3 All E.R. 703, 708.

The Republic of France has accepted its responsibilities by ratifying the Hague Evidence Convention. It would be improper for a national court to speculate whether the Republic of France will comply with a formal request under The Hague Convention. It is to be presumed that the Republic of France will, with due regard to comity, seek to assist the American court if doing so is consistent with its international obligations. The United States court will have the opportunity to reconsider the matter and to protect the interests of the parties to the litigation if the mechanism proves unfruitful and if justice so requires. *Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S. Ct. 3346, 3359-3360 (1985) (feasibility of international arbitration of antitrust issues is not to be prejudged).²³

Because it appears that the substantial national interests of both the United States and France can be accommodated, this case should be a relatively easy one for a United States court to decide. The more taxing challenge will come when a U.S. court is asked to find a foreign state's interests in preventing production of information for United States courts sufficiently great as to demand a partial restriction of U.S. interests as a matter of comity. Such a challenge was presented to the English

²³ Concerns for due process and fairness to the parties have led this Court to define limits on the authority of lower courts to sanction parties for failure to produce required information. Absent bad faith conduct or the "courting of legal impediments", no sanctions should be imposed, *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers* ("Societe"), 357 U.S. 197, 209, 212 (1958), and adverse inferences should be drawn only as necessary to achieve fairness, not to deny it. However, neither bad faith by the party nor its courting of impediments can be a justification for overriding comity considerations in determining whether to order discovery in the first instance. Comity is intended to recognize the interests of foreign sovereigns as well as those of individuals caught in the middle.

court in *R. v. Grossman*²⁴ and was resolved in a manner favoring self-restraint.

III. THE APPLICATION OF ONE NATION'S LAWS IN A MANNER THAT REQUIRES VIOLATIONS OF THE LAWS OF A FOREIGN SOVEREIGN SHOULD BE AVOIDED WHENEVER POSSIBLE, BECAUSE OF THE FUNDAMENTAL UNFAIRNESS TO THE PERSON IN THE MIDDLE.

Foreign sovereign compulsion is a recognized defense under United States law. *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970). United States courts regularly tailor orders so that parties will not be unfairly compelled to violate the law in their home or host nation. *E.g., United States v. General Electric Co.*, 115 F. Supp. 835, 878 (D.N.J. 1953) (decree in antitrust case provided that Dutch company would not be in contempt for doing anything outside the United States in accordance with the requirements of the state in which it was incorporated or doing business); *United States v. Watchmakers of Switzerland Info. Center, Inc.* [1965] Trade Cas. ¶ 71352 (S.D.N.Y. 1965) (antitrust consent decree expressly modified to take into account the requirements of Swiss law).²⁵ If the principle enunciated in those cases is followed, the protective order here should be granted. It would be anomalous and unsatisfactory, in any but the most extraordinary situation, for a court, in seeking to do justice, to require the violation of the law of a friendly sovereign state. Justice is not well served when disregard for the laws of a foreign sovereign is encouraged.

²⁴ See *infra* p. 11.

²⁵ It should be observed that in these cases, which involved remedial decrees, the existence of *in personam* jurisdiction was of course assumed. That did not prevent the court from giving proper regard to the laws of the foreign sovereign.

CONCLUSION

The governments of the United States, the Republic of France, the United Kingdom, and all other trading nations with developed legal systems have a common interest in the promotion of international trade and in the orderly and mutually supportive resolution of legal disputes which arise in international commerce. Reducing international jurisdictional conflicts is a vital national interest of the United States no less than of other nations.

Almost thirty years have passed since this Court, with great foresight, considered in *Societe Internationale v. Rogers*, several issues closely related to those raised here. That decision was a landmark of progress in resolving sovereign jurisdictional conflicts. This case provides an important opportunity for significant further progress to be made in the area of foreign sovereign conflicts—by promoting the practice of comity, by avoiding unfairness to the person in the middle, and by according due respect to the sovereign interests expressed in foreign defensive laws, especially where they seek to protect the effective implementation of clear public policies within the territory of the enacting state.

Accordingly, the judgment of the court of appeals should be reversed and the case remanded to the district court for an order directing the plaintiffs to use the Hague Evidence Convention to seek the required information.

Respectfully submitted,

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